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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, DAUGHTERS OF GEORGE D. PAPAVASILOPULO, DECEASED, ET AL.,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

DAVID STECKLER,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement	2
Questions presented	3
Reasons for allowance of the writ	4
Prayer for writ	6
Brief in support of petition	7
Opinion below	7
Statutory provision sustaining jurisdiction	7
Date of judgment sought to be reviewed	7
Statutes involved	7
Statement of the case	7
Argument	8
I. Moneys illegally collected by the United States as duties upon free imports, or erroneously paid, are held by the defendant in the nature of a trust, or bailment, repayable out of such excess deposits in the hands of the Collector, or out of moneys specifically appropriated by Congress	8
II. The action is not to recover duties as such, but moneys covered into the Treasury and held for intestate's benefit	22
III. The statute of limitations did not begin to run until the Comptroller General refused to pay the account in outstanding liabilities	23
IV. The Act of the Comptroller General in setting off the amount of the account in outstanding liabilities to the payment of a debt alleged to be owing by the intestate to the defendant, was in violation of Chap. 149, Act of March 3, 1875, as amended by Title II, Section 13, Chap. 212, Act of March 3, 1933	24

Table of Cases Cited.

	Page
Barney v. *Rickard*, 157 U. S. 352	9
Battel'e V. Evans v. *United States*, 7 C. Cls. 297	21
Boughton v. *Flint*, 74 N. Y. 476	19
Brune v. *Marriott*, Fed. Case 2052, Taney, 132; affd. 9 How. 619	5, 8
Carlisle v. *United States*, 29C.Cls.414	21
Curtis v. *United States*, 34 Ct. Cls. 1	21
Downes v. *Phoenix Bank of Charlestown*, 6 Hill (N. Y. 297	12, 15
Elliott v. *Swartwout*, 10 Pet. 137	9
Joannidis v. *Loeb*, 191 Fed. Rep. 93	11
Kennedy v. *United States*, 79 Fed. 893	22
Lippincott v. *United States*, 11 U. S. Cust. Appls. 29	12
Nitro Chemical Corporation v. *United States*, 71 C. Cls. 453	21
Pacific Co. v. *United States*, 80 C. Cls. 391	21
Patterson v. *United States*, 21 C. Cls. 322	21
Riccomini v. *United States*, 69 F. (2d) 480	23
Ravesies v. *United States*, 21 C. Cls. 243	21
Ray v. *United States*, 50 Fed. 166	16
Russell v. *United States*, 37 Ct. Cls. 113	18
Smiley v. *Fry*, 100 N. Y. 262	19
United States v. *Macy*, 13 Ct. Cust. Appls. 245	13
United States v. *Taylor*, 104 U. S. 216	15
United States v. *Wardwell*, 172 U. S. 48	5, 12, 13
Wayne v. *United States*, 26 Ct. Cls. 274	17

Statutes Cited.

Act of August 5, 1861, ch. 45	15
Act of June 22, 1874 (18 Stat. 190), ch. 391, sec. 21	2, 7
Act of March 3, 1875, ch. 149, as amended by sec. 13, ch. 212, Act of March 3, 1933, Title 31, Sec. 227, U. S. Code (47 Stat. 1516)	4, 7
Act of March 3, 1877 (19 Stat. 518)	18

Page

Act of June 10, 1890 (26 Stat. 131):
Ch. 407 9
Ch. 407, sec. 14 9
15 12
24 ..... 8, 9, 21
25 10
Act of May 27, 1908, sec. 2 (35 Stat. 405) 12
Act of February 13, 1925 (43 Stat. 939), sec. 3(b) 7
Act of June 17, 1930, Title IV, sec. 505, 46 Stat. 732 .. 8
Civil & Diplomatic Appropriations Bill of March 3, 1939, ch. 82, sec. 2, 5 Stat. 399, 348 9
Revised Statutes, Sec. 306, 307 and 308 ..... 13, 18
U. S. Code, Title 28, Sec. 262 (Judicial Code, Sec. 156) 6
U. S. Code, Title 31:
Sec. 149 ..... 4, 18, 20
150 ..... 4, 18, 20
151 ..... 4, 18, 20

OTHER AUTHORITIES CITED.

4 C. J. 1458 18
17 C. J. 639, sec. 203 22
17 C. J. 644, sec. 228 23
37 C. J. 481, sec. 196 19
37 C. J. 840 19
Customs Regulations of 1908, Art. 1082 8

SUPREME COURT OF THE UNITED STATES

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No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, DAUGHTERS OF GEORGE D. PAPAVASILOPULO, DECEASED; ANGELICA PAPAVASILOPULO, WIDOW OF JOHN D. PAPAVASILOPULO; DIONYSIUS PAPAVASILOPULO AND EUSTADIO PAPAVASILOPULO, SONS OF SAID JOHN D. PAPAVASILOPULO; AND DIONYSIUS N. TAMVAKIS, A SON OF ATHENA TAMVAKIS,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable, the Supreme Court of the United States:

The petition of the above named petitioners, respectfully shows:

1. They are all adults, and aliens, and reside in, and are nationals of, the Kingdom of Greece.

2. This petition seeks a review of a decision of the Court of Claims of the United States, sustaining a demurrer to

their petition filed in that court for the recovery of $19,-603.34, the amount of certain checks issued by the Collector of the Port of New York to one, Eustadio D. Papavasilopulo, in payment of refunds of duties assessed upon duty-free imported goods. An order was made dismissing said petition (R. 14). Eustadio D. Papavasilopulo died October 16, 1918. Petitioners are his next of kin.

3. The ground of the decision was that the six year statute of limitation barred the cause of action in that it accrued more than six years after the expiration of thirty days from the dates of the liquidation of the entries in the Custom House (U. S. Code, Sec. 262, Title 28). The decision of the Court of Claims was filed June 2, 1941, and is reported in Case No. 45,214 (92 Ct. Cls. 93).

Statement.

4. The petition below alleged that petitioners were entitled to recover the sum of $19,603.34 refunds of duties illegally assessed upon importations; and that the authority for the claim was Section 21 of Ch. 391 of the Act of June 22, 1874 (18 U. S. Stat. 190); and Ch. 407 of the Act of June 10, 1890 (26 U. S. Stat. 131) (R. 1-2).

5. The petition further alleged that the intestate was an importer of goods, and during the years 1905 to 1909 inclusive, made certain importations at the Port of New York, indicated in the entry papers set forth in the petition, and amounts of refunds to which he became entitled; further that there was erroneously assessed against the said merchandise duties under the then existing Tariff Act, and in order to obtain the release thereof the intestate paid the duties aforesaid (R. 2-5).

6. The petitioners further alleged that prior to liquidation of the entries, the Board of General Appraisers, which had jurisdiction of the review of duties assessed by the

collector, made a determination that the goods were duty free, and the intestate was entitled to a refund of the duties so paid (R. 3-4).

7. The petition further alleged that thereafter the Collector drew checks to the order of the intestate to pay said refunds, dated, numbered, and in amounts set forth in the petition (R. 4); that owing to the importer's death and the fact that the petitioners were beyond the seas, no one was present in the United States to receive the same; and that the Collector transmitted them to the Comptroller General, as an outstanding liability of the defendant (R. 4).

8. The petition further alleged that notwithstanding the issuance of said checks, the Comptroller General on October 13, 1936, directed that said liability be used as an offset in partial liquidation of a claim for loss of revenue claimed to be due to the defendant from the intestate, with compound interest at 6% per annum, which direction and application were without legal right in law or in fact (R. 5-6).

Questions Presented.

9. The questions presented are:

(a) Whether the six year statute of limitations barring prosecution of claims against the United States in the Court of Claims, is applicable to this case.

(b) Whether the deposits were not held by the defendant in the nature of a trust for the benefit of the importer, or as a bailment.

(c) Whether the moneys deposited by the intestate with the Collector, and by him transmitted to the Comptroller General to be placed in the account of outstanding liabilities, were not held in trust, or as a bailment, for intestate's benefit.

(d) Whether the moneys deposited with the Collector were not illegally exacted by the Collector on the representation that the goods were dutiable, and whether as to such deposits the defendant did not stand in the relation of a trustee or bailee.

(e) Whether in exacting deposits to cover estimated duties upon non-dutiable goods the defendant had not received the same in a fiduciary relationship, or as bailee.

(f) Whether the statute of limitations did not begin to run from the date when demand for the return of the deposits was made and refused.

(g) Whether moneys deposited by an importer to cover alleged duties upon duty free goods for which the Collector, in the performance of an administrative duty and as a disbursing officer of the Secretary of the Treasury has issued checks to pay a refund of such duties, which checks were held in the account of outstanding liabilities of the defendant under Sections 149, 150 and 151 of Title 31 of the United States Code, may not be recovered within six years after demand for payment is made and refused.

(h) Whether in applying said moneys in outstanding liabilities to an alleged indebtedness of the intestate to defendant, with compound interest, upon which no suit had been brought, the Comptroller General did not violate Ch. 149, Act of March 3, 1875, as amended, and whether such act was not illegal and void.

Reasons for Allowance of the Writ.

10. The reasons relied on for allowance of the writ are as follows:

(a) The Tariff Act in force at the time provided that moneys deposited with the Collector were to insure payment of the duties as a condition of release of the goods, which were duty free, as was determined by the Board of General Appraisers. Pursuant to statute Congress appropri-

ated annually a fund for the refund of such duties. Checks were drawn by the Collector to pay same, and the moneys represented thereby were thereafter deposited in the account of outstanding liabilities to the credit of the intestate. The moneys were, therefore, earmarked as belonging to the intestate, and remained on deposit in the Treasury in the same manner as if the moneys had been deposited in a bank, or as the Government holds principal and interest on its bonds and other obligations, and moneys in the Registry of the Court. A trust relationship or bailment existed which imposed upon defendant the duty to pay upon demand. The statute of limitations did not begin to run until demand for payment and refusal. The petition shows that the demand for payment was refused on October 13, 1936, and suit was brought within six years from that date.

(b) The question here presented is of public concern, for the reason that importers of merchandise should know whether when they make deposits with a collector for estimated duty upon duty free goods, the money is not available to the depositor on demand.

(c) Importers should know whether money in the account of outstanding liabilities received under the circumstances of this case must not be returned on demand.

(d) The precise question here presented has never been passed on by this Court.

(e) The decision of the Court of Claims is in direct conflict with the rule of law stated by the Court in *Marriott* v. *Brune*, Fed. Cases 2052; *Taney*, 132, affirmed by this Court in 50 U. S. (9 How.) 619, which held that estimated duties are in the nature of a deposit, or pledge; and in conflict with *United States* v. *Wardwell*, 172 U. S. 48, and other decisions of this Court.

(f) The court below has interpreted the Customs Administrative Law of 1890 with respect to the payment of refunds of duties deposited upon duty free importations,

contrary to the spirit and intent of the statute, in holding that checks issued for such refunds checked out by the Collector against funds in the treasury and deposited by the Comptroller General in the account of outstanding liabilities, are barred by the six-year statute of limitations (Sec. 262 of Title 28 of the United States Code, being Sec. 156 of the Judicial Code).

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of, and under the seal of this Court, directed to the Court of Claims of the United States, commanding that court to certify and send to this Court, on a day certain to be designated therein, a full and complete transcript of the record of all proceedings of the said court in this cause, to the end that the same may be reviewed and determined in this Court; and that the final order of the said court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order may be reversed and the demurrer overruled, and judgment ordered for the petitioners; and that the petitioners have such other and further relief as to this Court may seem just and proper; and petitioners will ever pray.

Dated, New York, N. Y., August 26th, 1941.

DIONYSIA E. TSERIONI and POLYTIME ANTONOPULO, Daughters of George D. Papavasilopulo, Deceased; ANGELICA PAPAVASILOPULO, Widow of John D. Papavasilopulo, and DIONYSIUS PAPAVASILOPULO and EUSTADIO PAPAVASILOPULO, Sons of Said John D. Papavasilopulo; and DIONYSIUS N. TAMVAKIS, a Son of Athena Tamvakis,
Petitioners,

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PETITIONERS' BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims is reported in Case No. 45,214, June 2, 1941 (92 Ct. Cls. —; R. 7-14).

(A) The Statutory Provision Sustaining Jurisdiction to Review the Judgment.

The statutory provision sustaining jurisdiction to review the judgment is section 3 (b), Act of Feb. 13, 1925, 43 Stat. 939.

(B) The Date of the Judgment Sought to be Reviewed.

The judgment sought to be reviewed was entered in the office of the Clerk of the Court of Claims on June 2, 1941 (R. 14).

(C) The Statutes Involved.

The statutes involved are Section 21 of Ch. 391, Act of June 22, 1874 (18 Stat. 190); Ch. 407, Act of June 10, 1890 (26 Stat. 131); and Ch. 149, Act of March 3, 1875, as amended by Sec. 13, Ch. 212, Act of March 3, 1933, Title 31, Sec. 227, U. S. Code (47 Stat. 1516).

(D) Statement of the Case.

The petitioners seek the review of a judgment of the Court of Claims entered June 2, 1941, sustaining a demurrer to the petition in the court below, upon the ground that it did not allege a cause of action against the United States within the jurisdiction of that court, in that more than six years had elapsed since the accrual of the cause of action when it was brought in that court. A detailed statement of the facts upon which the cause of action is founded, is set forth in the petition for a writ of certiorari in this Court.

ARGUMENT.

(Italics ours.)

I.

Moneys Illegally Collected by the United States as Duties Upon Free Imports, or Erroneously Paid, Are Held by the Defendant in the Nature of a Trust, or Bailment, Repayable Out of Such Excess Deposits in the Hands of the Collector, or Out of Moneys Specifically Appropriated by Congress.

A.

Under the then Tariff Act, as is also the case under the present act, moneys received by Collectors are deposits of duties against the importation, subject to appraisal and liquidation.

Section 24, Ch. 407, Act of June 10, 1890; 26 Stat. 140, which was then in force, provided for the refund of moneys paid or *deposited* with a Collector for unascertained duties.

Customs Regulations of 1908 provided as follows:

> "Art. 1082—*Refund of Excess of Deposits.* Whenever it is found that more money has been deposited with the Collector, as unascertained or estimated duties, than is found to be due upon the liquidation of the entry, *the excess shall be refunded from the Collector's 'Excess of Deposits Account.'* Where no remittances are received for the above account, or where it has been exhausted, Collectors shall forward an estimate for the necessary funds to pay the same."

And this is now the procedure (Act of June 17, 1930, Title IV, Section 505; 46 Stat. 732).

In *Brune* v. *Marriott*, Fed. Case 2052; Taney, 132; affd. 50 U. S. (9 How.) 619, the Court had under consideration

the effect of a similar section then in force, and Taney, C. J., sitting in the Circuit Court of Maryland, said:

> "The payment of the money upon the estimated duties is rather in the nature of a *pledge or deposit than a payment;* for it remains in the hands of the proper officer, subject to the final assessment of the duties and if more has been paid than is due (which is most commonly the case), the surplus belongs to the importer, and is returned to him."

This ruling was approved in *Barney* v. *Rickard,* 157 U. S. 352, 362 and 363.

Prior to the Customs Administrative Act of 1890 (Ch. 407, Laws of 1890; 26 Stat. 131), it had been the custom of bringing suits against Collectors to recover duties. As a result large sums of money remained in the hands of Collectors, who were threatened by suits, and to prevent such actions (*Elliott* v. *Swartwout,* 10 Pet. 1937) a section was inserted in the Civil & Diplomatic Appropriations Bill of March 3, 1839, Ch. 82, Sec. 2; 5 Stat. 339, 348 which read, in part, as follows:

> "• • • but when it shall be shown to the satisfaction of the Secretary of the Treasury *that in any case of unascertained duties or duties paid under protest more money has been paid to the collector or person acting as such, than the law required should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."*

Thereafter, Sec. 24 of Ch. 407, Laws of 1890 (26 Stat. 140) was enacted in substantially the same form, and the section, as amended, reads as follows:

> "Sec. 24. That whenever it shall be shown to the satisfaction of the Treasury that in any case of un-

> ascertained, or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of the money in the Treasury not otherwise appropriated. *The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation;* * * * Provided that the Secretary of the Treasury shall in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this act, or of any other act of Congress, relating to the revenue, together with the copies of the rulings under which repayments were made."

And Sec. 25 of the same act provided:

> "Sec. 25. That from and after the taking effect of this act no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges or duties on or on account of said merchandise * * *".

Thus not only was provision made to prevent the bringing of suits against the Collector or other officer of the customs for duties, but the Secretary of the Treasury was required to direct the Treasurer to make refunds out of the money in the Treasury not otherwise appropriated, and *permanent indefinite appropriations were provided by Congress* to pay such refunds.

No provision was made in the statute as to the time to pay the refunds, nor was any time set for demand by the importer. The only inference that can be drawn from these provisions and from the provision that Congress was to provide "a permanent and *indefinite* appropriation" to

pay such refunds, is that the importer could make application therefor, and the Treasurer could pay the same, at *any time*. The word "indefinite" has been defined in the Standard Dictionary to mean, "without limitation", and in the statute meant without limitation as to amount.

It has been the immemorial custom to pay refunds promptly, but very often they have been paid ten, fifteen, and even twenty years after liquidation. Accordingly, the Collector, being the disbursing agent of the Secretary of the Treasury (*Joannidis* v. *Loeb*, 191 Fed. 93), well knowing that refunds were payable at any time, drew the checks in question (R. 4).

The demurrer admits that payment was refused by the Comptroller General not because the statute of limitations barred it, but because he had directed the sum to be applied against an alleged claim against the intestate for loss of revenue; that the Government's claims were without legal right or justification, and that no credit, offset or counterclaim existed in favor of the defendant against the intestate or petitioners (R. 5-6). Such application by the Comptroller General could only have been made upon the assumption that the money represented by the checks in outstanding liabilities belonged to the intestate.

It was held by Lacombe, J., in *Joannidis* v. *Loeb*, 191 Fed. 93, that the refund of moneys under the Customs Administrative Act of June 10, 1890, pursuant to a decision of the Board of General Appraisers, and the drawing of the checks by the Collector, were administrative functions under the Act.

It was the duty of the Collector under the statute and regulations then in force, to make the refunds, and there was nothing therein requiring payment at any particular time after liquidation. Nor was there any limitation of time when the importer was required to make demand. Congress appropriated the money to pay the refunds by a

permanent and indefinite appropriation, and the intestate could have demanded the money, and was entitled to have it, at any time.

In this case the imported material was free, and the taxing of a duty thereon was illegal. Money deposited with a collector as estimated duty on free goods, as the Board of General Appraisers here determined, could only have been received in trust for the importer. The Government had no legal right to exact it, and in good morals should at all times be ready to repay it. When the collector, as disbursing agent of the Secretary of the Treasury, drew the checks and transmitted them to the Comptroller General to be held in the account of outstanding liabilities, it placed the defendant in the precise situation as a bank holding deposits, and courts of high authority have held from time immemorial that the statute of limitation does not operate until demand for payment is made and refused by the Bank (cf. *U. S.* v. *Wardwell*, 172 U. S. 48; *Downes* v. *Phoenix Bank of Charlestown*, 6 Hill (N. Y.) 297).

> "The right of an importer to a refund of duties collected by the Government upon a measure of goods not imported, not only rests its foundation upon the decent rights of man, but has ever been carefully and scrupulously upheld by the courts" (*Lippincott* v. *United States*, 11 U. S. Cust. Appls. 29).

The Board of General Appraisers made its determination that the goods were duty free. The Collector liquidated the entries, and petitioners became entitled to the refunds under Sec. 2 of the Act of May 27, 1908 (35 Stat. 405), which amended Sec. 15 of Chap. 407 of the Act of June 10, 1890, by adding thereto as follows:

> "All final *judgments*, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in Sec. 24 of this act."

The determination of the Board of General Appraisers was a final judgment of a court of competent jurisdiction (*United States* v. *Macy*, 13 Ct. Cust. Appls. 245, 248).

The money due to the intestate under the judgment of the Board of General Appraisers and liquidation of the entries was not subject to any statute of limitation, and in drawing the checks the Collector was satisfying a judgment of a judicial tribunal.

B.

There are, however, certain other cogent facts in this case which definitely establish a relationship in the nature of a trust or bailment. The checks were covered into the Treasury by deposit into the account of outstanding liabilities, which implied a promise that the money was on hand in the Treasury, available to those entitled thereto.

A case in point is *United States* v. *Wardwell*, 172 U. S. 48. In June, 1869, three checks were issued in favor of Wardwell on the Assistant Treasurer of the United States. They were lost or destroyed and the amounts thereof were, as here, covered into the Treasury and carried into the account of "outstanding liabilities." Wardwell died. In 1890 his administratrix applied for payment but was refused. In 1896, 27 years after the checks were issued, but within six years after such refusal, she brought suit in the Court of Claims. The Government pleaded in bar the six-year statute of limitations. A recovery was allowed. On appeal by the Government to this Court it was held that the limitation did not begin to run until demand for payment of the checks had been made and refused. In construing sections 306, 307 and 308 of the Revised Statutes, Mr. Justice Brewer, writing for the court, said (pp. 52-54):

> "It is further contended that sections 306, 307 and 308 relate to what is simply a matter of bookkeeping, and do not in any manner change the scope of the lia-

bility of the Government. But we are of the opinion that they mean something more. *While it may be that they do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a promise by the Government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given.* If bookkeeping was the only matter sought to be provided for, there were no need of section 309. That prescribes payment, and payment in a particular way. The payee does not simply surrender his cheque and receive money; but 'on presenting the same to the proper officer' he is 'entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor.' * * * It will also be noticed that the purpose of the Act of 1866 was, as expressed in its title, not merely to 'facilitate the settlement of the accounts of the Treasury of the United States,' not merely to perfect a system of bookkeeping, but also 'to secure certain moneys—to persons to whom they are due, and who are entitled to receive the same.' * * * In other words, the purpose of the Government by this statute is to secure to each party who holds government paper the amount thereof, to place it in the treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. *Congress has directed that the money already once appropriated and chequed against shall be placed in the treasury and held subject to the call of the party for whose benefit it has been so appropriated and chequed. There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section* 308 *is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section*

1069 *begins to run.* There is thus no conflict with that section. Its full force is not impaired.

"In this connection it may not be amiss to notice those authorities in which it is held that upon the ordinary deposit of money with a bank no action will lie until a demand has been made, by cheque or otherwise, and that hence the statute of limitations will not begin to run until after a refusal to pay on such demand."

Citing *Downes* v. *Phoenix Bank of Charlestown,* 6 Hill. 297, the Court quoted from the opinion of Bronson, J., who said:

"Here, the contract to be implied from the usual course of the business is, that the banker shall keep the money until it is called for. Although it is not strictly a bailment, it partakes in some degree of that character."

The Attorney General will undoubtedly endeavor to distinguish that case by claiming that the checks were delivered six years from the dates when the original claims accrued. There is no merit to this contention, for the decision went expressly upon the ground that the money had been appropriated by Congress and checked against, and not because of delivery of the checks. However, in the case at bar the placing of the checks in outstanding liabilities operated as a delivery.

United States v. *Taylor,* 104 U. S. 216, is also in point. By Ch. 45 of the Act of August 5, 1861, it was provided that the surplus proceeds of sales of real estate sold for direct taxes due to the United States shall, after satisfying the tax, costs and charges, be deposited in the Treasury to be held for the use of the owner, nine years after the sale. Taylor sued in the Court of Claims to recover the amount on deposit. The Government pleaded the statute of limitations. He recovered. On appeal to this Court, the Court said at p. 221:

"*This section limits no time within which application must be made for the proceeds of the sale. The*

> *Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his representative should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any number of years had elapsed did not authorize him to refuse payment.* The person entitled to the money could allow it to remain in the treasury for indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time."

The *Taylor* case was held to "be in point by this Court in the *Wardwell* case.

Ray v. *United States*, 50 Fed. 166, is also in point. There the action was to recover income taxes deducted from the salary of a District Judge. On May 10, 1872, a statement was made by the First Comptroller of the Treasury showing that $504.71 had been withheld from his salary. This was referred to the Commissioner of Internal Revenue who entered the same under a schedule of claims for the refunding of taxes erroneously assessed. Thereupon an account was stated by an auditor of the Treasury, which was certified for payment on August 2, 1875, and a draft issued for the amount to the order of the District Judge. *The draft was held in the office of the Commissioner of Internal Revenue* or the First Comptroller until May 31, 1887, a period of 18 years after the last deduction. It was then covered in outstanding liabilities. On May 18, 1891, demand was made for payment which was refused. Action was brought November 12, 1891. It was claimed that the six-year statute barred the action. At page 168 the Court said:

> "It is insisted that the claim in suit first arose at the time between 1864 and 1869 when the tax was wrongfully deducted and withheld from the salary of Judge

McDonald. * * * The Government thereafter held this fund in the nature of a trust, awaiting demand of the payee or his legal representative. *Rev. St.* 1878, *Sec.* 307, *makes a permanent appropriation for the payment of all such outstanding and unpaid drafts.* Section 308 provides for their payment on presentation thereof, *without limit of time.* Under such circumstances, the fund became impressed with a trust. United States *v.* Taylor, 104 U. S. 216; Waddell's Case, 25 Ct. of Cls. 323; Wayne *v.* United States, 26 Ct. Cls. 274."

In *Wayne* v. *United States*, 26 Ct. Cls. 274, the suit was to recover the amount of a draft in outstanding liabilities. It was issued December 8, 1873, but was never received since *it was stolen in the mails.* The six-year statute of limitations was interposed as a defense. Richardson, C. J., said (pp. 288-289):

"In our opinion this defense cannot prevail. *Money carried to the appropriation account of 'outstanding liabilities' is held in the nature of a trust fund awaiting demand of the parties to whose credit it stands.* Revised Statutes, Sec. 307, makes a permanent appropriation for the redemption and payment of all such outstanding and unpaid drafts, and Section 308 provides for their payment when presented, without limit of time.

* * * * * * *

"We now hold that the statute of limitation does not run against outstanding liabilities so entered in the books of the Treasury Department for which there is a permanent appropriation and other provisions by Revised Statutes, Secs. 306, 307, 308, until the outstanding drafts, etc., are presented, *or demand is made* without the draft and its nonproduction is properly accounted for. The case cannot be distinguished in principle from that of Taylor (104 U. S. R. 216) affirming the judgment of this Court (14 C. Cls. R. 339).

* * * * * * *

> "The statute of limitations does not run against a fund held in trust until the trustee disavows the trust. When, on demand by the claimant's predecessor, in 1888, the Comptroller of that year not only refused payment, but, overruling the previous action of his predecessors of more than ten years standing, *ordered the money to be withdrawn from the account of outstanding liabilities and carried to another account, and that was done, this was a disavowal of the trust, and the statute might begin to run from that date, but not before.* This suit was commenced within the six years from that time."

In *Russell* v. *United States*, 37 C. Cls. 113, suit was brought on an account in outstanding liabilities. By an Act of Congress of March 3, 1877 (19 Stat. 518) an appropriation was made for payment of claims allowed by the Commissioner of Claims. A check for $725.00, allowed to one, Edwards, was mailed *but not delivered*, and was returned to the Treasury, whereupon it was covered into the Treasury. It was held that the plaintiff would have been entitled to recover, but for the fact that the act with respect to Edwards' claim had been repealed.

Sections 149, 150 and 151 of Title 31 of the United States Code, under which the intestate's checks (R. 4) were covered into the Treasury, are the same as sections 306, 307 and 308 of the Revised Statutes referred to in the *Wardwell* case.

Thus, the money in outstanding liabilities was in legal effect a permanent appropriation for the redemption and payment of the checks of petitioners, who were entitled to a warrant for payment.

With respect to appropriations made by Congress for the payment of indebtedness owing by the Government, the word "appropriation" must be given its customary meaning (4 C. J. 1458).

That the checks here were never delivered is immaterial. The money was covered into the Treasury as an outstanding liability owing to petitioners. That the Comptroller General directed application thereof to partial liquidation of a claim for alleged loss of revenue alleged to be due the United States from the intestate is also immaterial to this question (R. 9-10). He had no legal right to make such direction as the court below found, "neither the deceased Eustadio D. Papavasilopulo, nor the plaintiffs, was ever indebted to the United States in any amount for any purpose, and the United States was not entitled to use or apply these refunds on export duties as an offset in partial liquidation of any claim against Papavasilopulo or the plaintiffs" (R. 10).

C.

Concededly there can be no right in the Government to retain money paid by an importer upon free goods, and the least that the importer can expect is that the money will be held as a bailment. In such a case the bailor has the right to redelivery on demand (37 C. J. 840).

Thus the right of action for the money due accrued on demand and refusal.

> "Where a deposit of money is made the general rule is that a cause of action accrues in favor of the depositor against the depositary only upon demand and refusal, or the assertion of some adverse claim in the depositary" (37 C. J. 481, Sec. 196).

See *Smiley* v. *Fry*, 100 N. Y. 262; and
Boughton v. *Flint*, 74 N. Y. 476.

The action of the Comptroller General in directing application of the amount on deposit in the Account of Outstanding Liabilities, was the assertion of an adverse claim, which entitled the petitioners to sue.

In the opinion of the court below sustaining the demurrer, Judge Littleton stated that the rule of law relating to deposits had no application to this case for the reason that the "amounts paid to the Collector of Customs upon the entry of the merchandise pursuant to the assessment made by the collector, were not deposits in the true sense of the word although, for the purpose of fixing the amount of tariff duty actually due on the imported merchandise, the amounts paid to obtain release of the merchandise were in the nature of deposits on account of the duties imposed by the statute. More might be due * * *. In making the original assessments the collector was administering an act of Congress, and in making payments thereof the importer was discharging an obligation under the act * * *" (R. 13). In this the court erred and overlooked the fact that the merchandise here involved was free.

The court also stated that "the right to sue having once occured and the period of limitation within which suit might be brought upon the award (of the Board of General Appraisers) having expired, we think a new cause of action with a new period of limitation was not created by the drawing of the checks by the Collector of Customs and the withholding of the amount of such checks by the Comptroller General" (R. 12-13). We respectfully submit that in this the court was again in error. We have shown that when the collector drew the checks he was performing a duty under Sec. 24 of Ch. 407 of the Act of 1890 (26 Stat. 131). He could perform that act at any time since the statute fixed no time for payment of refunds, and undoubtedly he drew the checks well knowing that it was his duty to do so; and in depositing the checks in outstanding liabilities the Comptroller General was also performing an administrative act under Sections 149, 150 and 151 of Title 31 of the United States Code.

There is no question here of the extension of a statute of limitations by a public official, as the Attorney General argued below and may argue here. We do not contend that any public official may extend a statute of limitation. We contend that under Section 24, quoted above, Congress directed that refunds be paid at any time "out of the money in the Treasury not otherwise appropriated", and provided that the moneys therefor "be deemed a permanent and indefinite appropriation"; and Section 1082 of the Customs Regulations, which has the force of law, also provided for payment of refunds out of the Excess of Deposits Account. And when the checks were deposited by the Comptroller General in the account of Outstanding Liabilities as provided in Sec. 149 of Title 31 of the United States Code, the money constituted a fund standing to "the credit of the parties in whose favor such certificates, drafts, or checks were issued, or to the persons who are entitled to receive payment therefor."

In the court below the defendant cited in support of its position *Battelle & Evans* v. *United States,* 7 Cls. 297; *Patterson* v. *United States,* 21 C. Cls. 322; *Ravesies* v. *United States,* 21 C. Cls. 243; *Carlisle* v. *United States,* 29 C. Cls. 414; *Curtis* v. *United States,* 34 Ct. Cls. 1; and *Nitro Chemical Corporation* v. *United States,* 71 C. Cls. 453; but examination of them will show at a glance that none has any pertinence here. They are all contract cases. The cases of *Battelle & Evans,* and of *Curtis,* involved contracts for sales of goods; *Patterson* and *Ravesies* involved suits to recover fees; *Carlisle's* case was for work done, and the *Nitro Chemical Corporation* case was a suit upon an award by the Secretary of War for services rendered.

Nor is *Pacific Co.* v. *United States,* 80 C. Cls. 391, cited below of any pertinence. That was an action for the recovery of the proceeds of an alleged seizure of plaintiff's property by the Government, paid into court.

Kennedy v. *United States*, 79 Fed. 893, cited below by the defendant as an "unusually strong case" that the statute of limitation was a bar, is no authority. The action was to recover drawback on the exportation of imported goods. Drawback was refused. The question before the court was from what date the statute of limitation began to run. The court held that the date was of exportation, and not the date of the decision of the Treasury Department refusing the claim. In this case we are dealing with refunds of customs duties illegally assessed, directed to be refunded by congressional appropriation, and which had been placed in the account of outstanding liabilities for the benefit of the importer.

II.

The Action Is Not to Recover Duties as Such, But Moneys Covered into the Treasury and Held for Intestate's Benefit.

Congress has plenary power to prescribe specific methods by which importers' rights against the Government may be enforced.

> "The refunding of duties by reason of a protest sustained by the board of general appraisers is a function of the secretary of the treasury, and not of the collector; and the latter may not be restrained by a suit from disposing of such moneys. • • • *A refund to which an importer is entitled may not be arbitrarily or capriciously refused by the secretary of the treasury*" (17 C. J. 639, sec. 203).
>
> "The former system, or recovering duties paid, prevailed until the Customs Administrative Act of 1890 was passed, radically changing the method of obtaining customs refunds. Appeal to the secretary of the treasury, a former prerequisite to the court action, was done away with, and the action itself was superseded by proceedings before the board of general appraisers. *It is held that the remedy thus provided*

the importer is exclusive, and that no proceedings may be maintained for the recovery of duties paid • • •"
(17 C. J. 644, sec. 228).

See *Riccomini* v. *United States*, 69 F. (2d) 480-483.

That this is so is best illustrated by the fact that although millions of entries of imported merchandise have been made, not a single suit has been brought against any collector or customs officer for the recovery of refunds since the adoption of the Customs Administrative Act of 1890. Accordingly, it serves no useful purpose to discuss the question when the statute of limitation begins to run in an action to recover duties. This action is to recover the money deposited in the account of outstanding liabilities which was demanded and refused.

III.

The Statute of Limitations Did Not Begin to Run Until the Comptroller General Refused to Pay the Account in Outstanding Liabilities.

In the court below the Attorney General cited Sections 14 and 15 of the Customs Administrative Act of June 10, 1890, as fixing the date when a cause of action for refunds accrued. A mere reading of these sections will show that their only purpose was to fix a limit of time within which the importer was allowed to protest the rate and amount of duties assessed, and have the same reviewed by the Board of General Appraisers and the Circuit Court. They made no provision limiting actions to recover refunds.

A statute of limitation must be clear and explicit and may not be left to implication. Citation of law on this well settled principle is unnecessary.

The decision of the court below that the six year statute of limitation for the recovery of refunds began to run at the expiration of 30 days from the determination of the

Board of General Appraisers is not supported by anything contained in the statute. Sections 14 and 15 are followed by Section 24 providing that whenever it shall appear that more money has been deposited or paid than was found due, the Secretary of the Treasury shall direct the Treasurer to pay the excess in the manner stated. If the Secretary of the Treasury refuses to pay, he may be compelled by mandamus to do so administratively, as was suggested by the court below when it said "Whether the proper officials of the Government may still pay the refunds, we do not decide" (R. 14). However, in this case, the collector performed his duty. He issued the checks which were turned into outstanding liabilities. We are suing here for the amount of that account.

IV.

The Act of the Comptroller General in Setting Off the Amount of the Account in Outstanding Liabilities to the Payment of a Debt Alleged to Be Owing by the Intestate to the Defendant, Was in Violation of Chap. 149, Act of March 3, 1875, as Amended by Title II, Section 13, Chap. 212, Act of March 3, 1933.

That statute provides that when a final judgment is recovered against the United States, or other claim allowed against it, it shall be the duty of the Comptroller General to withhold payment of an amount of such judgment or claim equal to any debt due to the United States, and if the plaintiff or claimant denies liability, the Comptroller General shall withhold payment and bring action on the government's claim. Here the Comptroller General did not *withhold* payment, nor was action brought, but he *directed an offset* in partial liquidation of a claim of loss of revenue with compound interest at 6% per annum. The demurrer admits the allegations of paragraph "Eighteenth" of the petition (R. 5-6).

The court below held that the defendant "was not entitled to use or apply these refunds as such offset" (R. 10). In view of this decision the money in the account was available to the plaintiffs, and they are entitled to recover the same. Assuming even that the intestate withheld duties, the Government's claim could only carry interest, if allowed by the court. Certainly the Comptroller General could not add interest, let alone compound interest at 6%.

It is respectfully submitted that the writ should be allowed as prayed for.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Barney v. *Rickard*, 157 U. S. 352	5
Bonwit Teller & Co. v. *United States*, 283 U. S. 258	5
Brune v. *Marriott*, 4 Fed. Cas. No. 2052	5
Daube v. *United States*, 289 U. S. 367	8
First Nat. Bank of Greencastle v. *United States*, 15 C. Cls. 225	5
Francesco Pacifico v. *United States*, 80 C. Cls. 391	5
Good v. *Martin*, 95 U. S. 90	8
Irving Trust Co. v. *Leff*, 253 N. Y. 359	8
James v. *United States*, 69 C. Cls. 215	5
National Fire Ins. Co. v. *United States*, 72 C. Cls. 663	5
Nitro Chemical Corp. v. *United States*, 71 C. Cls. 453	5
Ohio Steel Foundry Co. v. *United States*, 69 C. Cls. 158	5
Patterson v. *United States*, 21 C. Cls. 322	4
Ravesies v. *United States*, 21 C. Cls. 243	5
United States v. *Taylor*, 104 U. S. 216	6
United States v. *Wardwell*, 172 U. S. 48	6, 7
Young v. *Clarendon Township*, 132 U. S. 340	8
Statutes:	
Judicial Code, sec. 156 (28 U. S. C. 262)	4
Act of June 10, 1890, 26 Stat. 131, as amended by the Act of May 27, 1908, 35 Stat. 403:	
Sec. 14	9
Sec. 15	10
Sec. 24	14
Rev. Stats., secs. 306, 307, 308	7
Uniform Neg. Instr. Act, sec. 16	8
Miscellaneous:	
16 Comp. Gen. 365	3
Customs Regulations (1908):	
Article 1061	7
Article 1069	7
Article 1076	7
Article 1082	6
Article 1084	7

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–14) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered June 2, 1941 (R. 14). The petition for a writ of certiorari was filed on September 2, 1941 (R. 14). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether a claim for refund of customs duties accrues at the time the duties are finally determined to have been erroneously assessed or only upon demand by the importer for payment.

2. Whether the drawing of checks by the Collector of Customs to the order of an importer in the amount found to be erroneously assessed, and the transmittal of these checks by the Collector to the Comptroller General as an outstanding liability of the United States, creates a new cause of action on which suit may be brought in the Court of Claims within six years after the date the checks were drawn.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix, pp. 9–14.

STATEMENT

The facts, as alleged in the petition in the Court of Claims, are as follows:

Eustadio D. Papavasilopulo was engaged in the business of importing in New York City during the years of 1905 to 1909, inclusive (R. 2). Papavasilopulo imported and was the ultimate consignee of certain mechandise imported during those years at the Port of New York (R. 2). In order to secure the release of the merchandise, the importer paid certain import duties assessed by the Collector of Customs (R. 2). On appeal,

the Board of General Appraisers, which then had jurisdiction of such matters, made a determination that part of the imported merchandise was free of duty (R. 3). Thereafter, during the years 1910 to 1912, the importer's entries were duly liquidated, in accordance with the decision of the Board, by the Collector of Customs for the Port of New York (R. 2–3) and the amount due the importer was determined to be $19,603.34 (R. 2–3).

On June 25 and 26, 1934, almost twenty-five years after liquidation, the Collector of Customs of the Port of New York drew checks totalling $19,603.34 to the order of the importer, and transmitted them to the Comptroller General as an outstanding liability of the United States (R. 4). On October 13, 1936, the Comptroller General (16 Comp. Gen. 365) refused to make payment of the refunds represented by the checks, on the ground that the importer was indebted to the United States, and that the refunds were to be used in partial offset of the Government's claim (R. 5–6). The petition denies the existence of any such debt owing to the United States (R. 6).

Petitioners, the living heirs of the importer, instituted this suit in the Court of Claims on June 20, 1940 (R. 1), to recover $19,603.34 (R. 6–7). The Government demurred to the petition and the case was argued and submitted on the demurrer (R. 7). The court below dismissed the

petition on the ground that under the pertinent customs statute, the cause of action accrued not later than 30 days after the liquidation by the Collector of the entries in question in 1910, 1911, and 1912, and that consequently the suit was barred by the six-year statute of limitations applicable to actions brought in the Court of Claims.

ARGUMENT

1. The decision of the court below that the six-year statute of limitations (Jud. Code, sec. 156, 28 U. S. C., sec. 262) began to run when the Collector of Customs liquidated the importer's entries in accordance with the unappealed decision of the Board of General Appraisers, and that no further demand by the importer was necessary, is correct. Sections 14, 15, and 24 of the Act of June 10, 1890, as amended by the Act of May 27, 1908, imposed the duty upon the Secretary of the Treasury, after final liquidation by the Collector, to make refund of the duties found by the Board to have been illegally exacted.

The right of action therefore arose not later than the date of final liquidation after the decision of the Board of General Appraisers, unless a demand for payment was necessary to perfect the claim.[1] *Patterson* v. *United States,* 21 C. Cls.

[1] Final liquidation by the Collector occurred after the decision of the Board (R. 3), and the claim accrued, at the latest, at the expiration of the thirty days allowed for a possible further appeal to the Board or to the circuit court. Sec. 15 of the Act of June 10, 1890, as amended.

322; *Ravesies* v. *United States,* 21 C. Cls. 243; *Nitro Chemical Corp.* v. *United States,* 71 C. Cls. 453; *Francesco Pacifico* v. *United States,* 80 C. Cls. 391; cf. *First Nat. Bank of Greencastle* v. *United States,* 15 C. Cls. 225. Nothing in the provisions of the statute expressly requires a demand by the importer as a condition precedent to his right to the refund or to the Secretary's duty to make payment. Nor is there any reason to imply such a requirement. Petitioners' sole argument to the contrary is that duties paid constituted a "deposit" and that on general principles a demand is a condition precedent to recovery of a deposit. This contention is without substance. The moneys erroneously collected were merely "payments" of duties, as clearly appears from the statute.[2] See *Barney* v.

[2] If the opinion in *Brune* v. *Marriott*, 4 Fed. Cas. No. 2052 (C. C. D. Md., 1849), be construed as supporting petitioners' theory, the opinion is directly contrary to the views expressed by this Court in the *Barney* case. While this Court there approved the holding of the *Brune* case, it disapproved a contention that the moneys paid as duties were a "deposit" and expressly refrained from approving the language of the opinion in the *Brune* case on which petitioners rely (Pet. 9).

In the analogous case where taxes are paid which are subsequently determined by the Board of Tax Appeals or the Commissioner to have been illegally assessed, it is settled that the claim accrues at the time of the final determination, for purposes of suit under the Tucker Act. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265; *First Nat. Bank of Greencastle* v. *United States*, 15 C. Cls. 225, 228–229; *Ohio Steel Foundry Co.* v. *United States*, 69 C. Cls. 158, 167; *James* v. *United States*, 69 C. Cls. 215, 220; *National Fire Ins. Co.* v. *United States*, 72 C. Cls. 663, 669.

Rickard, 157 U. S. 352, 358–359, 363–364. Section 14 of the Act of June 10, 1890, provides that an importer dissatisfied with a decision of the Collector "as to the rate and amount of duties chargeable * * * shall * * * give notice in writing to the collector * * * and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon." Provision is made for an appeal to the Board of General Appraisers "upon such notice and payment."

The decisions in *United States* v. *Wardwell,* 172 U. S. 48, *United States* v. *Taylor,* 104 U. S. 216, and the lower court cases cited by petitioners (Pet. 15–18), that the funds there in question were held by the United States in a type of trust account and that therefore a right to payment did not arise until a demand for payment was made, are not in point. They turn upon the particular provisions of the applicable statutes there involved, provisions which, as the court below correctly held, differ significantly from the Act of June 10, 1890, and expressly envisage the holding of the funds by the United States on behalf of the claimant and a demand for payment.[3]

[3] Article 1082 of Customs Regulations (1908), which refers to refunds of "deposits" and which petitioners assert governed the importer's claim for a refund (Pet. 8), does not pertain to the refunding of ascertained duties found by the Board of General Appraisers to have been illegally exacted. Under the 1908 regulations, such refunds were made

2. Petitioners also urge that a new cause of action arose upon the drawing of checks in 1934 to the order of the importer, and assert a conflict on this point between the decision of the court below and *United States* v. *Wardwell,* 172 U. S. 48. But in that case, the checks were delivered to the claimant and lost by him, and the funds checked against were thereafter covered into the "outstanding liability" account of the Treasury pursuant to statutory direction. The opinion of the court rests wholly upon the trust relationship created by the deposit of the funds in the Treasury accounts in accordance with Rev. Stats. secs. 306, 307, 308 (31 U. S. C., sec. 149, 150, 151). Here, on the other hand, the petition in the Court of Claims admits that the checks were never delivered to the importer or his representative, and there is neither an allegation that the Collector intended delivery of the checks to the importer nor an allegation that the funds checked against have been covered into the "outstanding liabilities" account.[4] Accordingly, there can be no conflict with the *Wardwell* case. And, of

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only after the transmittal of certified statements to the Secretary of the Treasury, and not from the collector's "Excess of Deposits Account." Customs Regulations (1908), Arts. 1061, 1069, 1076, 1084.

[4] While the petition alleges that the checks were transmitted to the Comptroller General "as an outstanding liability of the defendant" (R. 4), it is nowhere alleged that the funds checked against were covered into the "outstanding liabilities' account" of the Treasury.

course, the mere drawing of the checks without delivery to the importer creates no liability on the part of the United States. *Good* v. *Martin*, 95 U. S. 90, 96; *Young* v. *Clarendon Township*, 132 U. S. 340, 353; Uniform Neg. Instr. Act, sec. 16; *Irving Trust Co.* v. *Leff*, 253 N. Y. 359, 363 (1930). The events of 1934 were intradepartmental only; the matter was still *in fieri*, and, therefore, never ripened into an account stated. Cf. *Daube* v. *United States*, 289 U. S. 367, 372.

CONCLUSION

The decision of the court below was correct and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Act of June 10, 1890, 26 Stat. 131, as amended by the Act of May 27, 1908, 35 Stat. 403, provides, in part, as follows:

> SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers

who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this Act: *Provided, however,* That the board of three general appraisers, or a majority of them, who decided the case may, upon motion of either party, within thirty days next after their decision, and not afterwards, grant a rehearing of said case when, in their opinion, the ends of justice may require it.

The general board of nine general appraisers shall have power to establish from time to time such reasonable rules of practice, not inconsistent with the law, as may be deemed necessary for the conduct of their proceedings and of the proceedings of the said board of three general appraisers, and to assign or reassign any case to any of such boards of three at any time before promulgation of decision, in order to secure uniformity of decision.

SEC. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this Act, as to the construction of the law and the facts respecting the classification of

such merchandise and the rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next after such decision, if a rehearing has not been previously granted, or within thirty days next after the decision of the board of general appraisers after such rehearing, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent as the case may be. Thereupon the court shall order the board of general appraisers to return to said circuit court the record and the evidence taken by them, together with the certified statement of the facts involved in the case, and their decision thereon; and all competent evidence taken by and before said board of general appraisers shall be evidence before said circuit court. The parties litigant shall hereafter be required to introduce all of their evidence before the said board of general appraisers prior to its decision of the case. The return made by the board of general appraisers in pursuance of the order of the circuit court shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification: *Provided,* That the said circuit

court is further vested with the power to remand any case pending before it on appeal from a decision of the board of general appraisers when, in its opinion, such proceeding is just and proper, but this shall not be ordered except upon motion duly made and after notice to the opposite party. When such order is made the case shall then be remanded to the board of general appraisers whose decision has been appealed from, and the said board shall hear such further testimony as shall be introduced by either party, and shall return to the circuit court the additional evidence so taken, together with a further certified statement of facts as supplemented or modified by such additional testimony, and their decisions upon the whole case as thus supplemented or modified, which said additional return shall be added to and become part of the record upon which the case shall be heard and determined by the circuit court.

The decision of such circuit court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of the opinion that the question involved is of such importance as to require a review of such decision by the circuit court of appeals of the United States within the circuit in which the matter arises, in which case said circuit court or the judge making the decision may, within thirty days thereafter, allow an appeal to said circuit court of appeals; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision. On such original application and on any such appeal security for

damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said circuit court of appeals shall have jurisdiction and power to review such decision, and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

The decision of such circuit court of appeals may be reviewed by the Supreme Court of the United States in any of the ways provided in cases arising under the revenue laws by the Act approved March third, eighteen hundred and ninety-one, entitled "An Act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section twenty-four of this Act.

For the purposes of this section the circuit courts of the United States shall be deemed always open, and said circuit courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

Where cases arise at ports within any jurisdiction having no circuit court, applications for review of the decisions of the board of general appraisers provided for in section fifteen of this Act shall be filed with the clerks of the courts having cog-

nizance of the same classes of cases as circuit courts, and such cases shall be heard and determined by such courts, with the same powers and in like manner as herein provided for the hearing and determination of such cases in circuit courts, and such decisions shall be subject to review in the manner provided by law.

* * * * *

SEC. 24. That whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of any money in the Treasury not otherwise appropriated. The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation; and the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation, for or against the United States, at any time within one year of the date of such entry, but not afterwards: *Provided,* That the Secretary of the Treasury shall in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this act or of any other act of Congress relating to the revenue, together with copies of the rulings under which repayments were made.

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OCTOBER TERM, 1941

No. 579

DIONYSIA E. TSERIONI AND POLYTIME ANTONOPULO, DAUGHTERS OF GEORGE D. PAPAVASILOPULO, DECEASED, ET AL., *Petitioners,*

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

DAVID STECKLER,
Counsel for Petitioners.

TABLE OF CASES

	PAGE
Barney v. Rickard, 157 U. S. 332	1
Bonwit Teller & Co. v. United States 283 U. S. 258	4
Daube v. United States, 289 U. S. 367	4
First Nat. of Greencastle v. United States, 15 C. Cls. 225	4
Good v. Martin, 95 U. S. 90	4
Irving Trust Co. v. Leff, 253 N. Y. 359	4
James v. United States, 69 C. Cls. 215	4
National Fire Ins. Co. v. United States, 72 C. Cls. 663	4
Ohio Steel Foundry Co. v. United States, 69 C. Cls. 158	4
United States v. Wardwell, 172 U. S. 48	2
Young v. Clarendon Township, 132 U. S. 340	4

STATUTES

Customs Regulations (1908):	
Article 1061	2
Article 1069	2
Article 1076	2
Article 1082	1
Article 1084	2

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PETITIONERS' REPLY BRIEF

In the footnote on page 5 of the defendant's brief the statement is made that in *Barney* v. *Rickard*, 157 U. S. 332, this Court "expressly refrained from approving the language in Brune v. Marriott" (Pet. 9). We find nothing in the *Barney* case which can by any stretch of the imagination be construed as indicating an intention by this Court to refrain from approving the language of the Court in the *Brune* case that moneys paid as duties were paid as a deposit. It must be assumed that, in quoting the precise language of Taney, J., that "the payment of the money upon estimated duties is rather in the nature of a deposit or a pledge than a payment", this Court approved the ruling.

In the footnote on page 6 of the defendant's brief, the statement is made that Article 1082 of Customs Regulations (1908), referring to refunds of deposits, does not pertain to the refunding of ascertained duties found by the Board of General Appraisers to have been illegally exacted. Article 1082 refers to excess duties found due to the im-

porter "upon the liquidation" of the entry (Pet. Brief, p. 8). Under the statute there could not have been any liquidation of the entry after protest. Liquidation was suspended until after the determination of the Board of General Appraisers, and there was no liquidation until after such determination. Articles 1061, 1069, 1076 and 1084 of the 1908 Customs Regulations, referred to in the footnote, refer to refunds made upon *reliquidation* of customs entries which are made by the Secretary of the Treasury after transmittal to him by the collector of certified statements, and are not made from the collector's "Excess of Deposits Account".

The defendant asserts on page 7 of its brief that we have urged that a new cause of action arose upon the drawing of the checks in 1934 to the order of the importer We have not made such an assertion. What we did say was, and what we contend is, that the statute of limitation began to run from the date when demand for payment was made on the Comptroller General and refused by him.

The defendant argues that *United States* v. *Wardwell*, 172 U. S. 48, is not applicable here because the checks in that case were delivered to the claimant and subsequently lost by him, and that the funds against which they were checked were thereafter covered into the "outstanding liability" account of the Treasury. In their petition in the Court below the petitioners alleged that after the checks here involved were drawn by the collector they were transmitted to the Comptroller General "as an outstanding liability of the defendant" (Tr. Rec., p. 4, par. 12th). This allegation of fact was admitted by the demurrer. It also appears from the petition (Tr. Rec., p. 6, par. 18th) that the Comptroller General refused to pay the petitioners' claim for the reason that the refunds represented by the checks were directed to be used as an offset in partial liquidation of a claim for loss of revenue alleged to be due to

the defendant from petitioners' intestate, which direction and application were without legal right or justification in law or in fact. This allegation of fact was also admitted by the demurrer.

The contention is made by the Government that the drawing of the checks did not evidence an intention to deliver them, and that the petition did not allege that the amount thereof was "covered" into the "outstanding liability" account (Deft. Brief, p. 5). It is true that the precise words, "covered into the Treasury", were not used in the petition below, but it may fairly be inferred from its context that the moneys represented by the checks were covered into the Treasury. This appears from the admitted allegations that the checks were transmitted to the Comptroller General as an "outstanding liability" of the defendant (Rec. 4, par. Twelfth), and that the Comptroller General directed the application of the money "as an offset in partial liquidation of a claim for loss of revenue" (R. 5-6, par. Nineteenth). It is difficult to see how, if the money was not covered into the Treasury, the Comptroller General could direct application thereof to pay an alleged claim of the defendant. We submit that upon the argument of a demurrer and upon appeal from an order sustaining it, the pleader whose pleading is attacked is entitled to the benefit of every inference which may fairly be drawn from the pleading under attack.

Moreover, the Court below held that "neither the deceased, Eustadio D. Papavasilopulo, nor the plaintiffs, was ever indebted to the United States in any amount for any purpose, and the United States [fol. 16] was not entitled to use or apply these refunds on export duties as an offset in partial liquidation of any claim against Papavasilopulo or the plaintiffs" (R. 10). If there were such a claim that might well be the subject of an offset under a proper plea.

In the footnote on page 5 of defendant's brief, the Government cites certain tax cases which it is claimed are analogous to the case here. They have no pertinence whatever to the questions here involved. In *First Nat. of Greencastle* v. *United States,* 15 C. Cls. 225, 228-229, and *National Fire Ins. Co.* v. *United States,* 72 C. Cls. 663-669, the statute under which the claims were made expressly provided for the bringing of suit within two years next after the cause of action accrued. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265; *Ohio Steel Foundry Co.* v. *United States,* 69 C. Cls. 158, 167; and *James* v. *United States,* 69 C. Cls. 215 at 220, have no relevance whatever. So, too, *Good* v. *Martin,* 95 U. S. 90, 96; *Young* v. *Clarendon Township,* 132 U. S. 340, 353; *Irving Trust Co.* v. *Leff,* 253 N. Y. 359, and *Daube* v. *United States,* 289 U. S. 367, 372, cited in defendant's brief (p. 8), have no relevance to the questions involved here.

Respectfully submitted,

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